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Case Number _____

UNITED STATES SUPREME COURT

October Term, 1994

GRACE INVESTMENT COMPANY, an Arizona Corporation; CANADIAN IMPERIAL BANK OF COMMERCE, a foreign corporation,

Petitioners,

versus

RED MOUNTAIN MACHINERY COMPANY,

Respondent.

PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the State of Arizona's mechanics' lien statutes be involuntarily imposed against real property leases of Indian land?

2. Can the Court of Appeals find, as a matter of law, that the Secretary of the Interior specifically adopted Arizona's mechanics' lien law merely by approving a lease of Indian land, which does not refer to the lien statute and where the record does not show that the Secretary approved of or actually considered the matter?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit Court of Appeals were Plaintiff-Appellant Red Mountain Machinery Company ("Red Mountain") and Defendants-Appellees Grace Investment Company ("Grace") and Canadian Imperial Bank of Commerce.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioners Grace and Canadian Imperial Bank of Commerce state that they have no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

REPORTED OPINION 1

STATEMENT OF JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT AND AUTHORITIES 3

I. Importance 3

II. The Regulation of Arizona Tribal Property 4

III. The Decision of Ninth Circuit Court of Appeals is Factually Incorrect 4

IV. Indian Law Preemption Standards 8

V. Application of the Arizona Mechanics' Lien Law is Incompatible with Federal Law and Must be Held Preempted 9

A. Leasing on Indian Land is Subject to Pervasive Regulation 9

B. The Arizona Mechanics' Lien Law Conflicts with Federal Regulations and Interests 10

C. The Arizona Mechanics' Lien Law is Incompatible with Tribal Interests 11

D. The State of Arizona has No Cognizable Interest in this Matter 14

VI. Conclusion 15

APPENDIX

REPORTED OPINION

The opinion of the Ninth Circuit Court of Appeals in this case has been reported at 29 F.3d 1408 (9th Cir. 1994).

STATEMENT OF JURISDICTION

Judgment was entered by the Ninth Circuit Court of Appeals on July 18, 1994.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. 2101 (c) and Rule 10 United States Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED

Arizona State Constitution, Article 20, Paragraph 4.

Arizona's Mechanics' Lien Statute, A.R.S. § 33-981.

25 C.F.R. § 1.4(a).

25 C.F.R. § 162.9.

25 C.F.R. § 162.12.

25 U.S.C. § 415(a).

28 U.S.C. § 1322(b).

28 U.S.C. § 1360(b).

STATEMENT OF THE CASE

Grace entered into a lease agreement ("Lease") with the Yavapai-Prescott Indian Tribe (the "Tribe") whereby Grace was to develop a retail shopping center on the Tribe's land outside Prescott, Arizona. Canadian Imperial Bank of Commerce loaned the construction funds to Grace for the construction of the shopping center.

The Lease between the Tribe and Grace stated, as required by 25 C.F.R. § 162.9, that all construction materials at the time of their inclusion in the improvements became the property of the Tribe.

Red Mountain allegedly rented construction equipment to a subcontractor of Grace. This subcontractor allegedly used the rental equipment to perform its work on the shopping center. The subcontractor filed for bankruptcy and did not pay Red Mountain. After completion of the improvements by Grace, Red Mountain recorded a mechanics' lien under Arizona law against Grace's leasehold interest under the Lease. The lien named the Tribe as owner of the real property and the legal description was of the Tribe's property. (These allegations are taken as true for the purposes of this Petition only.) On October 22, 1991 Red Mountain filed suit in the state court of Arizona to foreclose its lien.

The State court action was removed to the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1441. The district court accepted jurisdiction under 28 U.S.C. § 1331 because the action involves an attempt to encumber and foreclose a leasehold interest of Indian land in violation of federal law.

The United States District Court for the District of Arizona granted Grace's Motion for Judgment on the Pleadings treating the same as a Motion for Summary Judgment. The district court found that the Lease was subject to federal law, that the Lease did not specifically adopt Arizona's mechanics' lien laws, and that there was no express approval of the Lease by the Secretary of the

Interior.

The district court, after discussing the relevant statutes and case law, declared that the federal law preempted the Arizona mechanics' lien law and granted Grace's Motion.

Red Mountain appealed, and the Ninth Circuit Court of Appeals reversed and remanded.

Grace and Canadian Imperial Bank of Commerce now file their Petition for Writ of Certiorari with this Court.

ARGUMENT AND AUTHORITIES

I. Importance.

This Petition concerns an important question of Indian law and federal preemption which should be settled by this Court. Whether Arizona can impose its mechanics' lien statutes against leases of Indian land is a question of first impression which takes on added significance in this era of increasing development and commercial activity on Indian land.

By its present decision, the Ninth Circuit Court of Appeals has violated or ignored state constitutional and federal statutes and regulation under which Arizona Indian tribes are governed for the purpose of allowing monetary compensation to a non-Indian subcontractor with bad credit policies.

The federal and state governments involved guaranteed to the Indian tribes of Arizona the sovereign rights of a foreign nation. However, the Ninth Circuit Court of Appeals has now joined a minority of other states in reneging upon such guarantees for the benefit of non-Indians. The parallel of this decision to the treaty-breaking excuses given the plains Indians of the 1800's, after precious minerals were found on their reservations, is obvious.

This Court has an obligation to prevent the proliferation of state-imposed laws for everything from automobile licenses to

sales taxes at the expense of the tribes and in derogation of their sovereignty.

II. The Regulation of Arizona Tribal Property.

All Indian property within the State of Arizona is absolutely protected and insulated from state regulation. Ariz. Const. art. XX, ¶ 4.

The Congress of the United States has developed a complete and pervasive system of laws and regulations governing the Indian tribes (see C.F.R. Title 25) and in particular, all real property interests of the Indian tribes. See 28 U.S.C.A. §§ 1322 and 1360. This was specifically acknowledged by the Ninth Circuit Court of Appeals in its decision. Red Mountain Mach. Co. v. Grace Inv. Co., 29 F.3d 1408 (9th Cir. 1994), 1410-11.

The Arizona mechanics' lien law, A.R.S. § 33-981, et seq., by its very language, affects only real property and improvements erected upon real property. The Arizona Constitution makes this law non-applicable to real property or any improvements thereon owned by an Arizona Indian tribe. The federal statutes broaden the prohibition against encumbrances on Indian property to any "interest" in real property.

Thus, the lien claim sought to be enforced upon the Lease is prohibited by both federal and state law.

III. The Decision of the Ninth Circuit Court of Appeals Is Factually Incorrect.

The Ninth Circuit Court of Appeals ignored the Arizona Constitutional prohibition and the prohibitions of federal law by declining to "enter the fray" concerning federal preemption and determined that the Secretary of Interior had already decided that issue against Grace when he approved the Lease. The court concluded that

> , . . . the lease between Grace and the Tribe which was approved by the Secretary, specifically adopts

> the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project: . . .

29 F.3d at 1411.

The Ninth Circuit Court of Appeals further concluded that it need not engage in a preemption balancing analysis since

> . . . [T]he Secretary [of the Interior], pursuant to his statutory authority, has already engaged in such an analysis and has authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe.

Id. at 1410.

The Ninth Circuit Court of Appeals relied on two excerpts from Article 29 of the Lease to support its decision. Those excerpts provide:

> Lessor agrees that this Lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona...
>
> . . . .
>
> Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) may be governed by the laws of the State of Arizona or,

to the extent applicable, the laws of the United States. (emphasis added.)

(Lease at 42.)

The court below interpreted the term "encumbrance" as used in these provisions to include and authorize a mechanics' lien under Arizona law. This construction, however, is clearly wrong. The meaning of the term was previously established by Article 14 of the same Lease (entitled "Encumbrances") as action taken by the Lessee "for the purpose of borrowing for the development and improvement of the Leased Property" which "may be refinanced from time to time in Lessee's discretion" (Grace/Tribe Lease, at 23). Article 14 further provides that the Lessor and the Secretary shall approve the encumbrance instrument if it meets the requirements of the statutes and regulations (Grace/Tribe Lease at 24). Finally, the default provision of the Lease refers to the rights of "the encumbrancer (the holder of the beneficial interest under a deed of trust, an assignee under an assignment of lease as security, or a mortgagee)..." (Grace/Tribe Lease at 24).

It is therefore very clear that the term "encumbrance," as used in Articles 14 and 29 of the Lease, refers to consensual liens granted to obtain financing and not to involuntary encumbrances such as the application of the Arizona mechanics' lien statutes.

Subsection (c) of 25 C.F.R. § 162.12 clearly limits the type of encumbrance contemplated and authorized, i.e., a voluntary encumbrance undertaken for financing purposes. The involuntary encumbrance created by a mechanics' lien does not meet this requirement.

The regulation cited by the Ninth Circuit Court of Appeals contains the additional proviso that the "encumbrance instrument" must be approved by the Secretary of the Interior. While such a requirement is appropriate in the context of a mortgage or deed of trust, it cannot plausibly refer to a simple mechanics' lien form, the contents of which are dictated entirely by state statute. It must therefore be concluded that the imposition of Arizona mechanics'

lien law is directly contrary to 25 C.F.R. § 162.12.

The Ninth Circuit Court of Appeals also concluded erroneously that Article 29 of the Lease specifically adopted the Arizona mechanics' lien statutes. 1408 F.3d at 1411. As a matter of fact, the Lease does not refer to these statutes or to mechanics' liens at all.

Section 1.4 of 25 C.F.R. requires the Secretary or "his authorized representative" to adopt state law to Indian lands. 25 C.F.R. § 162.12(a) defines the Secretary's authorized representative as one who acts "under delegated authority." In fact, the Lease is not signed by the Secretary of Interior; it is signed by the acting Phoenix Area Director of the Bureau of Indian Affairs, as specifically found by the district court.[1]

There is no evidence that the acting director of the Phoenix Area of the Bureau of the Indian Affairs was delegated the authority to adopt Arizona law or approve the lease. There is no evidence that the Secretary of the Interior ever read, or even considered, the intricacies of the Lease *vis a vis* the Arizona mechanics' lien law.

Matters impinging on the delicate interplay between competing governmental interests should not be determined by inadvertence or caprice. If the Secretary actually intends to adopt state law, he should do so in forthright fashion. See, e.g., the action of the Secretary in adopting California zoning laws under 25 C.F.R. § 1.4(b), while explicitly choosing not to adopt or make applicable local zoning ordinances. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), citing 30 Fed.Reg. 8722.

Even where it is argued that the Secretary took action through approval of one particular lease, a court should require an explicit statement clearly reflecting such intent. In Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), the Tribe argued

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[1] Although apparently no one took care enough to notice that the Area Director's acknowledgment was not completed by filling in the information regarding delegation of authority.

Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), the Tribe argued that it had the unilateral right to terminate a lease, despite contrary regulations, because the document approved by the Secretary stated that the Tribe "and/or" the Secretary could terminate the lease. The court rejected that contention, indicating that such important issues should not turn on inferences of tacit approval arising from lease clauses which need not necessarily be read in the manner suggested by the proponent. Therefore, the lynch-pin assumptions of federal approval and inclusion engaged in by the Ninth Circuit Court of Appeals are baseless.

In this case, it was pure speculation on the part of the Ninth Circuit Court of Appeals that the Secretary approved the lease; specifically adopted the Arizona mechanics' lien law; or balanced the federal, state, and tribal interests.

IV. Indian Law Preemption Standards.

The Ninth Circuit Court of Appeals refused to consider the matter of preemption directly, ignored the serious aspects of preemption as they apply to Indian law, and treated the case as one of simple contract.

Because of the unique issues involved in Indian history and sovereignty, this Court has specifically determined that preemption questions should not be decided by traditional standards developed for other areas of the law. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). As a result, an express congressional statement of preemption is unnecessary to establish that a particular state law is preempted by operation of federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

When a state attempts to assert authority over non-Indians engaged in activities on the reservation, difficult questions arise which require scrutiny of the relevant federal statutes in order to balance the underlying policies and notions of sovereignty that have developed from historical traditions of tribal independence. Bracker, 448 U.S. at 144-145, 100 S.Ct. at 2584. Any ambiguities

traditional notions of sovereignty and with the federal policy of encouraging tribal independence. Id.

Preemption questions are not controlled by mechanical or absolute conceptions, but require flexible analysis sensitive to the particular facts and legislation involved. Cotton Petroleum, supra. The determination requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Dept. of Taxation & Finance of New York v. Milhelm Attea & Bros., ___ U.S. ____, 114 S.Ct. 2028, 2035 (1994), quoting Bracker, 448 U.S. at 142, 100 S.Ct. at 2583.

V. Application Of The Arizona Mechanics' Lien Law Is Incompatible With Federal Law And Must Be Held Preempted.

A. Leasing on Indian Land Is Subject To Pervasive Federal Regulation.

As noted by the Ninth Circuit Court of Appeals this area of law is subject to pervasive federal regulation. 1408 F.3d at 1411, fn. 2. In three leading cases, this Court has held that state law was preempted from application to transactions between Indians and non-Indians based on the pervasive nature of the federal involvement. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (concerning motor carrier license and fuel taxes charged to non-Indian corporations that conducted logging operations on the Fort Apache Reservation); Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) (concerning imposition of a tax on the gross receipts of a non-Indian construction company hired by the Tribe to build a school on the reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (concerning New Mexico's hunting and fishing laws). The instant case involves the leasing of tribal land which is governed by a federal regulatory scheme similar to that in Bracker, supra.

In addition to the detailed regulations governing terms of

In addition to the detailed regulations governing terms of leasing, 25 C.F.R. § 1.4(a) establishes the policy of the federal government regarding state regulation of property leased from Indian tribes as follows:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[2]

25 C.F.R. § 1.4(a) (1993).

The broad federal involvement in all aspects of Indian land leasing demonstrates that there is no room for additional regulation by the state.

B. The Arizona Mechanics' Lien Law Conflict With Federal Regulations and Interests.

In addition to the comprehensive nature of the federal regulatory scheme, a court must consider the potential conflict between the federal or tribal law and the regulatory authority which the state seeks to impose. New Mexico v. Mescalero Apache Tribe, supra. The Court of Appeals for the Tenth Circuit recently ruled that the Oklahoma statutes governing oil and gas royalty payments were preempted in view of the conflicting and comprehensive federal

[2] Paragraph (b) of this regulation allows the Secretary to specifically adopt state law in certain circumstances, further demonstrating the degree of federal control over such matters. Of course, Grace contends that the Secretary in this case did not in fact choose to adopt Arizona mechanic's lien law, as discussed supra.

Company, 25 F.3d 920 (10th Cir. 1994). In that case, the Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g, required the Secretary of the Interior to approve leases, require performance bonds, and oversee lease operations, while the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701-1757, authorized the Secretary to establish a royalty management system. The Secretary promulgated regulations concerning leases on Indian lands that the court viewed as comprehensive and as giving wide powers to the Secretary over all aspects of the leasing arrangement. Oklahoma's royalty statute was held preempted because it was incompatible with and interfered with the Secretary's interest in enforcing the federal regulations regarding late payments and penalties.

In the instant case, the Ninth Circuit Court of Appeals acknowledged that "leases of tribal land are governed by a complex federal statutory and regulatory scheme," 29 F.3d at 1410, but failed to recognize that the imposition of a mechanics' lien under Arizona law directly contradicted the relevant federal regulations.

C. The Arizona Mechanics' Lien Law Is Incompatible With Tribal Interests.

The Ninth Circuit Court of Appeals concluded that

> . . . [E]nforcement of Red Mountain's mechanic's lien in this case does not harm any economic interest of the Tribe or interfere with Tribal property interests or any interest in self-government.

29 F.3d at 1412.

and that

> the application of the mechanic's lien provision is consistent with a strong federal interest in promoting economic development on Indian lands.

Id.

The court rationalized that requiring Grace to pay Red Mountain would not affect the Tribe's rental income because construction costs are not included in the calculation of gross income used to determine additional percentage rent under the Lease.

The Ninth Circuit Court of Appeals' evaluation of the Tribe's interest was far too narrowly focused. Certainly, the potential for tribal monetary loss has been a factor in preemption cases dealing with taxation of business operations conducted on Indian land, e.g., Bracker, supra; Ramah Navajo School Board, supra; and Cotton Petroleum, supra. However, the nature of the tribal interest will naturally vary with the type of state law sought to be imposed. Thus, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), the main consideration related to Indian sovereignty and the tribe's right to regulate hunting and fishing on the reservation free from state interference. In Segundo v. City of Rancho Mirage, 113 F.2d 1387 (9th Cir. 1987), the court emphasized that enforcement of local rent control ordinances would necessarily preclude enforcement of a conflicting tribal ordinance, effectively negating the Tribe's authority to regulate the use of its lands.

In this case too, the Yavapai-Prescott Tribe has a strong interest in preventing Arizona from attempting to regulate construction on Indian land. The Tribe is fully capable of judging the desirability of enacting Tribal ordinances securing payment to construction workers (some of whom may be Tribal members as a result of Lease Article 48 establishing Indian preference in employment) and determining the most appropriate way of doing so.

The analysis of tribal interests must also consider the qualitative aspect of Indian participation in the reservation activity at issue. This Court has given greater weight to tribal interests which concern "value generated on the reservation by activities involving the Tribes," as opposed to the "modest" tribal interest at stake in many preemption cases, where the Tribe is merely selling tax-exempt products to nonmembers who do not receive significant tribal services. Dept. of Taxation & Finance, supra, citing

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). See also Mescalero Apache, supra, involving tribal enterprise to develop recreation area, and California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), prohibiting application of California regulatory authority over reservation bingo games.

In this case, the Tribe entered into a long-term Lease with Grace for the development of multiple use facilities, including retail, office, residential and recreational usages. The Ninth Circuit Court of Appeals acknowledged that the Tribe's benefits from the Lease were not limited to rental income, but also produced increased employment opportunities for tribal members and the development of facilities on tribal land that enhance the quality of life. 29 F.3d at 1412, fn. 5. Yet, the court did not give these tribal interest factors the weight they deserved. Ironically, the Ninth Circuit Court of Appeals overlooked its own decision expressed two years earlier in Gila River Indian Community v. Waddell, supra, to wit:

> That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference . . . . "

967 F.2d at 1410.

If the Tribe so chooses, it has the absolute sovereign right to have Grace, and no one except Grace, be the lessee. The Tribe should not be forced to accept the high bidder at some foreclosure sale as its new long-term lessee.

The various states in the United States more and more often now are eyeing the property of the Indian Tribes not for the good the states can do for the indians but for the good the indians can do for the non-indians and their state governments. Numerous cases seek revenues from operations on Indian land not so that the monies can help the Indian but that the monies can help the non-Indian line his own pockets. So too, in this case, is the non-Indian

rewarded for his own folly while the Tribe rights are ignored.

These states, sometimes with the help of the federal and state courts, ignore the sovereignty of the Indian tribes as assured by the federal government and impose laws on the citizens of what is legitimately a separate sovereign nation. Laws that the tribes never sought, and in most cases do not want, because they interfere with self government and economic benefit.

D. The State of Arizona Has No Cognizable Interest In This Matter.

The Ninth Circuit Court of Appeals did not justify its decision in this case by reference to any interest of the State of Arizona. Indeed, the record cannot support any conclusion that the interests of Arizona are sufficient to justify the assertion of state authority.

In Indian preemption analysis, a party cannot establish the existence of a sufficient state interest simply by showing that the state regulation is appropriate for the state as a whole, e.g., the desirability of certain hunting regulations, or merely by referring to the general purpose for which the law was passed, e.g., the state's general interest in taxing to raise revenue. Rather, the exercise of state authority must be justified by regulatory functions or services performed by the state in connection with the on-reservation activity. Mescalero Apache Tribe, 462 U.S. at 335, 103 S.Ct. at 2387, citing Ramah Navajo School Board and Bracker. Accord, Cotton Petroleum, supra (noting the district court's finding that New Mexico regulated the spacing and mechanical integrity of wells located on the reservation and provided substantial services to the Jicarilla Tribe and the non-Indian lessee at a cost of three million dollars per year); cf. Gila River Indian Community v. Waddell and Coosewoon v. Meridian Oil Company, supra.

In this case, no evidence was submitted regarding Arizona's involvement, if any, in the development and operation of the Frontier Village Shopping Center. As no findings on this issue were made by either of the lower courts, there is no foundation for the

argument that Arizona has a legitimate interest justifying the application of its mechanics' lien law in this situation.

VI. Conclusion.

The Ninth Circuit Court of appeals decision is fatally flawed by the unsubstantiated assumption of authorized approval of the lease by the Secretary of the Interior and inclusion of Arizona mechanics' lien laws into the Lease.

Since the inclusion of the Arizona laws is not supported, the traditional preemption analysis supports the conclusion of the United States District Court's decision and not that of the Ninth Circuit Court of Appeals' decision.

Application of Arizona's mechanics' lien law to the Lease in question is factually, legally and morally wrong.

The Ninth Circuit Court of Appeals decision must be reversed in order to protect the sovereignty of the Tribe, promote the economic ends of Indian development and serve the higher, historical goals of Indian Law.

RESPECTFULLY SUBMITTED this 15th day of October, 1994.

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APPENDIX

CONTENTS OF APPENDIX

Decision of the Ninth Circuit Court of Appeals A-2

Order of the United States District Court for the District of Arizona A-15

Ariz. Const., Art. XX, ¶ 4 ..... A-23

Arizona Mechanics' Lien Statute, A.R.S. § 33-981 et seq A-24

25 C.F.R. § 1.4 (a) and (b) A-25

25 C.F.R. § 162.9 ..... A-26

25 C.F.R. § 162.12 ..... A-27

25 U.S.C. § 415(a) A-28

28 U.S.C. § 1322 (b) A-29

28 U.S.C. § 1360(b) A-30

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RED MOUNTAIN MACHINERY COMPANY, an Arizona corporation,
Plaintiff-Appellant,

v.

GRACE INVESTMENT COMPANY, an Arizona corporation; CANADIAN IMPERIAL BANK OF COMMERCE, a foreign corporation,
Defendants-Appellees.

No. 92-16825
D.C. No.
CV-91-01840-CAM
OPINION

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, Senior District Judge, Presiding

Argued and Submitted
February 9, 1994—San Francisco, California

Filed July 18, 1994

Before: Betty B. Fletcher, Alex Kozinski and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Government Law/Native Americans/Business Law

The court of appeals reversed a district court order and remanded. The court held that, in an action seeking to enforce

a mechanics' lien against a non-Indian's leasehold interest in tribal land, federal law did not preempt application of a state mechanics' lien statute.

Appellee Grace Investment Co. leased tribal lands from the Yavapai-Prescott Indian Tribe to construct and operate a shopping center. The lease was entered into in compliance with federal laws governing the leasing of Indian lands, and was approved by the Secretary of the Interior. Under the lease, Grace was responsible for paying the cost of all construction on the shopping center project. In addition, under both federal regulations and the terms of the lease, Grace was required to provide security to guarantee completion of the project and payment in full of the claims of those who performed work on or provided materials to the project. In compliance with this requirement, Grace entered into a construction loan agreement with appellee Canadian Imperial Bank of Commerce. The lease also provided that Arizona law would apply to controversies related to the shopping center project, and that disputes between Grace and other non-Indian parties that might affect Grace's leasehold interest could be subject to state law.

Grace began construction of the project, and entered into a subcontract with Tempe Trenching Co. for the construction of water and sewer systems. Tempe contracted with appellant Red Mountain Machinery Co. to rent equipment necessary for Tempe to carry out its subcontract with Grace. At the conclusion of work on the project, Tempe owed Red Mountain unpaid rental charges. Without paying the charges, Tempe filed for bankruptcy.

Red Mountain recorded a Notice and Claim of Lien pursuant to Arizona's mechanics' lien law. Red Mountain filed an action in state court seeking to enforce the mechanics' lien against Grace's leasehold interest in the real property leased by Grace from the Tribe. The complaint did not seek to foreclose upon the underlying real estate, nor did it name the

Tribe as a defendant. The case was removed to the district court. The district court entered summary judgment for Grace, ruling that the Arizona lien law is preempted by federal statutory and regulatory control of leases involving Indian land. Red Mountain appealed.

[1] The Secretary authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe. [2] The extensive regulatory scheme governing leases of tribal land explicitly permits leases of tribal land to be encumbered if the lease contains a provision authorizing such an encumbrance. The lease between Grace and the Tribe, which was approved by the Secretary, specifically adopted the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the shopping center project. [3] The substantive law of Arizona confers upon parties such as Red Mountain that supply materials to construction projects the right to impose and enforce a mechanics' lien against a lessee's interest in the underlying property. In this case, by approving the lease, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law.

[4] Whether the lien was valid and could be foreclosed were questions for the district court on remand.

COUNSEL

Lawrence C. Wright, Mesa, Arizona, for the plaintiff-appellant.

G. Gregory Eaglebuger, The Eagleburger Group, Phoenix, Arizona, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Red Mountain Machinery Company ("Red Mountain") appeals the district court's order granting summary judgment in favor of Grace Investment Co. ("Grace") and the Canadian Imperial Bank ("the Bank") in Red Mountain's action seeking foreclosure of a leasehold interest in real property leased by Grace from the Yavapai-Prescott Indian Tribe ("the Tribe"). The district court held that the Arizona mechanics' lien law was preempted by federal law. We reverse and remand.

BACKGROUND

The facts are undisputed. Grace is an Arizona corporation engaged in real estate investment and development. By a lease dated October 7, 1988, Grace leased tribal lands from the Yavapai-Prescott Indian Tribe to construct and operate the Frontier Village shopping center. The Yavapai-Prescott Indian Tribe is a federally recognized and protected Indian Tribe. The lease was entered into in compliance with federal laws governing the leasing of Indian lands. *See* 25 U.S.C. § 415(a) (Supp. IV 1992); 25 C.F.R. pt. 162 (1993). The lease has a term of sixty-five years and contains an option to renew for an additional twenty-year period. The lease was approved by the Secretary of the Interior, through the Acting Phoenix Area Director of the Bureau of Indian Affairs.

The purpose of the lease was to facilitate the development of multiple-use facilities on tribal land, including retail, office, lodging, medical, residential, and recreational buildings. The lease granted Grace continued possession of the property for the term of the lease. Grace was responsible for paying the cost of all construction on the Frontier Village project. In addition, under both federal regulations and the terms of the lease, Grace was required to provide security to guarantee completion of the project and payment in full of the

claims of those who performed work on or provided materials to the project. In compliance with this requirement, Grace entered into a construction loan agreement with the Bank (the "Building Loan Agreement") under which the Bank agreed to advance an amount sufficient to cover the entire cost of construction. The Building Loan Agreement provided that all funds lent by the Bank were to be used only to pay the costs of construction and direct expenses of project development. As a condition for each construction advance, Grace was required to present evidence that it had paid for all work and materials previously supplied to the project. The Building Loan Agreement provided that Grace would be in default of the Agreement if Grace failed to discharge any mechanics' lien that might arise on the project.

After the lease was executed, Grace began construction of the Frontier Village Center. In February 1991, Grace entered into a subcontract with Tempe Trenching Company ("Tempe") for the construction of water and sewer systems. In April 1991, Tempe contracted with Red Mountain to rent equipment necessary for Tempe to carry out its subcontract with Grace.

At the conclusion of its work on the Frontier Village project, Tempe owed Red Mountain $55,872.14 in unpaid rental charges. Without paying these charges, Tempe went out of business and subsequently filed a "no asset" Chapter 7 bankruptcy. Tempe is not a party to this action.

On September 11, 1991, Red Mountain recorded a Notice and Claim of Lien pursuant to Arizona's mechanics' lien law. Ariz. Rev. Stat. Ann. § 33-981 (1990).[1] It claimed $55,872.14

[1]The Arizona law provides, in relevant part:

A. . . . [E]very person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improve-

and listed the Tribe as the owner of the property and Grace Investment Company as lessee. The legal description of the real property was attached to the notice. The lien was claimed on the real property and improvements.

On October 22, 1991, Red Mountain filed this action in state superior court seeking to enforce the mechanics' lien against Grace's leasehold interest in the real property leased by Grace from the Tribe. The complaint named Grace and the Bank as defendants. The Bank was joined as a defendant because it holds a mortgage on Grace's leasehold estate. The complaint did not seek to foreclose upon the underlying real estate, nor did it name the Tribe as a defendant.

This case was properly removed to federal court pursuant to 28 U.S.C. § 1441. On August 24, 1992, the district court entered summary judgment for Grace, ruling that the Arizona lien law is preempted by federal statutory and regulatory control of leases involving Indian land. Red Mountain filed a motion to amend the judgment on September 4, 1992. This motion was denied on September 11, 1992. Red Mountain timely appealed to this court.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this claim pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

A grant of summary judgment is reviewed de novo. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992); *T.W.*

> ment whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent. . . .

Ariz. Rev. Stat. Ann. § 33-981 (1990).

appellees argue that federal preemption is appropriate under either the traditional standards for federal preemption or under those standards that have developed in Indian law cases.

[1] Interesting as this dialogue may be, we need not enter the fray. Although we ordinarily would apply a fact-specific balancing test among federal, state, and tribal interests to determine if a state law applies in a given case, *see White Mountain Apache Tribe*, 448 U.S. 136, in this case we conclude that we need not engage in such a balancing test because the Secretary, pursuant to his statutory authority, has already engaged in such an analysis and has authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe.

Leases of tribal land are governed by a complex federal statutory and regulatory scheme. Federal law permits the Yavapai-Prescott Tribe to enter into long-term leases of their land, and to renew those leases once, as prescribed, for a number of years. 25 U.S.C. § 415(a) (Supp. IV 1992). All leases and renewals must be made according to detailed regulations promulgated by the Secretary of the Interior, and each lease or renewal requires the Secretary's approval. *Id.* Pursuant to this statutory grant of authority, the Secretary has promulgated detailed regulations governing the leasing of tribal lands. 25 C.F.R. pt. 162 (1993).

[2] The extensive regulatory scheme governing leases of tribal land explicitly permits leases of tribal land to be encumbered if the lease contains a provision authorizing such an encumbrance. 25 C.F.R. § 162.12(a) & (c) (1993).[3] In accor-

[3]Section 162.12 provides, in relevant part:

> (a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit . . . .

Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). Because there is no dispute with respect to the underlying facts, we must determine whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

This case raises the question of whether a state law of general applicability, the Arizona mechanics' lien statute, may be applied to allow foreclosure of a leasehold interest in tribal land held by a non-Indian. On a number of occasions the Supreme Court has addressed whether state laws apply to regulate non-Indians conducting business on Indian reservations. The Court has repeatedly emphasized that "no rigid rule" governs such an exercise of state authority. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Instead, the Court has stated that we must assess on a case-by-case basis "two independent but related barriers to the assertion of state regulatory authority over tribal reservations": (1) federal preemption, and (2) tribal self-government. *Id.* at 142-43. Either barrier standing alone can be "a sufficient basis for holding state law inapplicable to activity undertaken on the reservation." *Id.* at 143.

At the outset, the parties disagree about the proper standard to apply to determine if the Arizona mechanics' lien law is preempted. Red Mountain argues that the principles of federal preemption in the area of Indian law are *sui generis* and that traditional standards of preemption do not apply.[2] In contrast,

[2]Outside the specific area of Indian law, federal law is held to preempt state law when (1) federal law expressly states that it preempts state law; (2) the federal scheme of regulation is so pervasive that it is reasonable to infer that Congress intended preemption; or (3) state law conflicts with federal law or stands as an obstacle to the accomplishment of Congress's full purposes. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 2481-82 (1991).

dance with this regulatory provision, the lease between Grace and the Tribe, which was approved by the Secretary, specifically adopts the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project:

> *Lessor agrees that this lease . . . and any encumbrances thereof,* and any subleases, assignments or other contracted agreements with respect thereto *. . . shall be construed in accordance with the substantive law of the State of Arizona . . . .*

Lease at 42 (emphasis added). The lease also provides that disputes between Grace and other non-Indian parties that might affect Grace's leasehold interest may be subject to state law:

> *Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto* (including, without limitation, any rights dealing

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. . . .

(c) *With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument[ ] must be approved by the Secretary.* If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold without the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

25 C.F.R. § 162.12(a) & (c) (1993) (emphasis added).

> with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) *may be governed by the laws of the State of Arizona* or, to the extent applicable, the laws of the United States.

Lease at 43-44 (emphasis added).

[3] As noted above, the substantive law of Arizona confers upon parties such as Red Mountain that supply materials to the construction projects the right to impose and enforce a mechanics' lien against a lessee's interest in the underlying property. Ariz. Rev. Stat. Ann. § 33-981 (1990); *Demund Lumber Co. v. Franke,* 14 P.2d 256 (Ariz. 1932) (noting that where an owner of property has leased land to a developer, a party that furnishes material to the lessee may have a lien only against the lessee unless the lessee is an agent of the owner). We conclude that by approving the lease that contained these provisions, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law.

In addition to the language in the lease, federal regulations require a lessee of tribal lands to provide assurances that the claims of subcontractors and suppliers who contribute their labor and materials to a development project on such lands will be paid. *See* 25 C.F.R. § 162.5(c) (1993). In this case the lease was the instrument that satisfied this requirement by requiring Grace to guarantee completion of the project and payment of the workers and materialmen by providing one of four types of security. One option available to Grace was to deposit cash in escrow "until the period fixed by law for the filing of all mechanics' or materialmen's liens on such improvement shall have expired." Lease at 15. This language further substantiates our conclusion that the Secretary recog-

nized that mechanics' liens could be filed against the leasehold and sought to guard against the consequences.[4]

In summary, we conclude that the federal government has already balanced the federal interests, state interests, and tribal interests. Although it is not our job to weigh the federal, state, and tribal interests in a case such as this where the Secretary has already done so, we emphasize that application of the mechanics' lien provision is consistent with a strong federal interest in promoting economic development on Indian lands. Ensuring that labor and materialmen and lenders who make possible development projects on tribal lands can take security to enable them to be paid promotes that development. Congress first authorized the long-term leasing of Indian lands in order to bring Indians much needed income that they could not receive under short-term leases. 25 U.S.C. § 415(a); H.R. Rep. No. 1093, 84th Cong., 1st Sess., 2691, 2692 (1955).[5] Federal regulations promote this policy by ensuring that suppliers and contractors who contribute to the development of tribal lands are paid. 25 C.F.R. § 162.5(c) (1993).

We also emphasize that enforcement of the mechanics' lien in this case does not harm any economic interest of the Tribe or interfere with Tribal property interests or any interest in

[4]We also note that the Building Loan Agreement between Grace and the Bank specifically contemplates that mechanics' liens might be filed against Grace's leasehold interest in the Tribe's property. The Building Loan Agreement provides that as a condition to receiving each construction advance from the Bank, Grace was required to provide evidence that it had paid for all work and materials previously supplied to the project. The Agreement further provided that Grace would be in default under the Agreement if it failed to discharge any liens that might arise on the project.

[5]Some of the benefits that the Tribe receives from its lease with Grace include substantial rental income, increased employment opportunities for members of the Tribe at the Frontier Village Center, the development of facilities on Tribal land that enhance the quality of life, and the return to the Tribe of possession of the property with all improvements when the term of the lease expires.

self-government. In entering the lease agreement, the Tribe conveyed its possessory interest in the land for a designated period of time, retaining a reversionary interest in the land. The mechanics' lien applies only to Grace's leasehold interest in the property, and not to the underlying property itself. *See Demund Lumber*, 14 P.2d 256. Because Red Mountain's claim may be asserted only against Grace, and because it does not affect the Tribe's reversionary interest in its property, no tribal interest will be harmed.[6]

Red Mountain requests an award of attorneys' fees pursuant to Ariz. Rev. Stat. Ann. § 33-998(B), which permits an award of reasonable attorneys' fees to a successful party in an action to enforce a lien.[7] Appellees argue that § 33-998(B) does not support an award of attorneys' fees in this case because the statute was not enacted until after Red Mountain filed its complaint and did not become effective until after the district court dismissed the action.

[4] We do not decide whether attorneys' fees may be awarded under § 33-998(B) in cases that were pending at the time this provision became effective because this issue is not properly before us. The only issue on appeal is whether federal law preempts the application of the Arizona mechanics' lien provision to the leasehold interest held by Grace.

[6]We also note that requiring Grace to pay Red Mountain will not affect the annual rental income that the Tribe receives under the lease. This rental income from the lease is based in part on sales revenue from the leased property, and is calculated by adding to an annual stipulated base rent a percentage of the portion of Grace's gross income that exceeds the annual base rent. Costs of construction, which would include the cost of paying Red Mountain's claim, must be paid by Grace and are not included in the calculation of gross income.

[7]Section 33-998(B) provides:

> In any action to enforce a lien granted under this article, the court may award the successful party reasonable attorney fees.

Ariz. Rev. Stat. Ann. § 33-998(B) (Supp. 1993).

Whether the lien is valid and may be foreclosed are questions for the district court on remand. After the district court decides these issues, it can then determine whether Red Mountain is a successful party and whether it is appropriate to award reasonable attorneys' fees under § 33-998(B) under the facts of this case.

CONCLUSION

We hold that federal law does not preempt application of the Arizona mechanics' lien provision to the leasehold interest held by Grace. The district court's order granting summary judgment for Grace is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RED MOUNTAIN MACHINERY COMPANY,
PLAINTIFF

vs.

GRACE INVESTMENT CO., et al.,
DEFENDANTS

No. CIV 91-1840 PHX CAM
ORDER

Having considered the defendants' motion for judgment on the pleadings, treated as a motion for summary judgment, the Court concludes as follows:

Background

The following facts are undisputed:[1]

By a lease dated October 7, 1988, Defendant Grace Investment Company leased tribal lands from the Yavapai-Prescott Indian Tribe in Prescott, Arizona to construct and operate a shopping center. SOF 4,7. The Yavapai-Prescott Indian Tribe is a federally recognized and protected Indian Tribe. SOF 4. The lease was entered pursuant and subject to federal laws governing the leasing of Indian lands. SOF 5. There is no provision in the lease which specifically adopts Arizona's mechanics' lien laws, and there has been no express approval by the Secretary of the Interior of the lease. SOF 6. Rather, the lease was approved by the United States Department of Interior, through the Bureau of Indian Affairs, by the acting Phoenix Area Director. SOF 6. The lease

[1] When the Court converted this motion for judgement on the pleadings to a motion for summary judgement, it ordered the parties to file statements of facts. The defendant filed its statement of facts. Plaintiff has not filed a statement of facts. However, it is clear from the pleadings that the few facts relevant to the determination of preemption are undisputed.

Ariz. Const., Art. XX, ¶ 4.

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right of title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Arizona's Mechanics' Lien Law, A.R.S. § 33-981.

A. Except as provided in §§ 33-1002 and 33-1003, every person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

C. A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, chapter 10[1] shall not have the lien rights provided for in this section.

D. A person required to give preliminary twenty day notice pursuant to § 33-992.01 is entitled to enforce the lien rights provided for in this section only if he has given such notice and has made proof of service pursuant to § 33-992.02.

E. A person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1,[2] shall not have the lien rights provided for in this section.

F. A person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has a written agreement with the owner of the property or with an architect who has a written agreement with the owner of the property.

25 C.F.R. § 1.4(a) and (b)

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. . .

25 C.F.R. § 162.9

Improvements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted.

25 C.F.R. § 162.12

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and . . . if the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.

25 U.S.C. § 415(a)

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educations., recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except . . . leases of land on the . . . . Yavapai-Prescott Community reservation, . . . which may be for a term of not to exceed ninety-nine years and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

28 U.S.C. § 1322(b).

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b).

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

has a term of 65 years with an option to renew for an additional 20-year period.

After execution of the lease, Grace began construction of the Frontier Village Center. In February of 1991, Grace entered into a subcontract with Tempe Trenching Co., Inc., a non-party to this action, for the construction of onsite and offsite water and sewer systems for Frontier Village Center. In April of 1991, plaintiff Red Mountain Machinery rented equipment to Tempe Trenching. That machinery was used by Tempe Trenching to carry out its subcontract with Grace on the Frontier Village project.

On September 11, 1991, when Tempe Trenching failed to pay the entire amount due to Red Mountain, Red Mountain recorded a notice of claim of Lien in the amount of $55,872.14. SOF 8. The lien listed the Tribe as the owner of the real property against which Red Mountain was claiming a lien. SOF 9. The legal description attached to the lien described the real property subject to the lien as the real property leased by Grace from the Tribe. SOF 10.

Procedural Background

On October 22, 1991, Red Mountain filed this action in Yavapai County Superior Court seeking foreclosure of the leasehold interest in the real property leased by Grace from the Tribe. SOF 11. The defendants subsequently removed the action to this court. SOF 12.

Defendants filed a motion for judgment on the pleadings arguing that the Arizona lien law is preempted by the pervasive Federal statutory and regulatory control of leases involving Indian land. Because the Court must consider documents outside of the pleadings, it has converted the motion to a motion for summary judgment. The plaintiff argues that the Arizona lien law is not preempted by federal laws.[2]

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[2] The plaintiff also argues that the defendants have waived or are stopped from asserting any governmental immunity defense. However, as the defendants do not raise the separate defense of governmental immunity, the Court will not consider the merits of plaintiff's argument.

Summary Judgment

Summary judgment may be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

The disputed fact(s) must be material. Id. Substantive law determines which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The dispute must also be genuine. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 249, 106 S.Ct. at 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-250, 106 S.Ct. at 2510-11. In a civil case, the question is:

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512.

The moving party who has the burden of proof on the issue at trial must establish all of the essential elements of the claim or defense for the court to find that the moving party is entitled to judgment as a matter of law. Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986); Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986). However, the moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, summary

judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an essential element of his case on which he will bear the burden of proof at trial. Id.

Preemption

The issue in this case is whether the Arizona mechanics' lien statute may be applied to allow foreclosure of a leasehold interest when the lessee is a non-Indian company but the subject of the lease is Indian land or whether the statute is preempted by the pervasive federal regulation of Indian trust lands.

Because of the unique historical origins of tribal sovereignty, the general preemption principles that apply to other areas of the law are inapplicable to the preemption issues regarding Indian tribes. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980). Therefore, the Supreme Court has rejected the proposition that in order to find a particular state law to have been preempted, an express congressional statement to that effect is required. Bracker, 448 U.S. at 144, 100 S.Ct. at 2584.[3] Rather, state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. Bryan v. Itasca County, Minnesota, 426 U.S. 373, 377, 96 S.Ct. 2102, 2105, 48 L.Ed.2d 710 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 1261, 36 L.Ed.2d 129 (1973). Where the state asserts authority over the conduct of non-Indians engaging in activity on the reservation, the courts must examine the language and policies of the statutes with a particularized inquiry into the nature of the statute, federal, and tribal interests at stake to determine whether the exercise of state authority violates federal law. Bracker, 448 U.S. at 144, 100

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[3] The plaintiff argues that the Arizona law is not preempted because there is no specific mandate from Congress barring applicatio of mechanics' lien laws. However, this argument is without merit. The Supreme Court has rejected the argument that "in order to find a particular state law to have been preemted by operatio of federal law, an express congressional statement to that effect is required." Bracker, 448 U.S. at 144, 100 S.Ct. at 2584 (citing Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, L.Ed.2d (1965).

S.Ct. at 2584. State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interest at stake are sufficient to justify the assertion of state authority. Bracker, 448 U.S. at 145, 100 S.Ct. at 2584. Ambiguities in federal law are generally construed in favor of Indian sovereignty. Bracker, 448 U.S. at 144, 100 S.Ct. at 2584.

Indian lands, including the leasing of those lands, are subject to pervasive federal regulation. See, 25 U.S.C.A. §391, et seq.; 25 C.F.R. §150 et seq. Pursuant to federal regulation, leases of tribal land or land held in trust for the benefit of Indians must be approved by the Secretary of the Interior. 25 C.F.R. § 162 et seq. There is no grant by Congress of general regulatory authority over Indian lands in Arizona or specific grant of authority to impose mechanics' liens upon interests in Indian land. Thus, the state mechanics' lien law, A.R.S.§33-981, et seq., is preempted. Bryan, 426 U.S. at 377, 96 S.Ct. at 2105; McClanahan, 411 U.S. at 170-71, 93 S.Ct. at 1261.

Moreover, the applicable statutes and regulations specifically provide that the states may not encumber the real property of Indian land. Congress has limited states' civil jurisdiction over Indians in both 25 U.S.C.A. §1322 and 28 U.S.C.A. §1360.

28 U.S.C.A. §1360 provides that the listed states[4] have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in Indian country to the same extent that those laws are applicable to private persons or private property. 28 U.S.C.A. §1360(a)(west supp. 1992). Section 1360(b) limits that jurisdiction as follows:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against

[4] Arizona is not one of the listed states. Id.

alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C.A. §1350 (b)(1976).

25 U.S.C.A. §1322 provides:

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the

alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property for any interest therein.

25 U.S.C.A. §1322 (a)(b) (1983).

Relevant to the state and local regulation of the use of Indian property, federal regulation provides:

§1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting zoning or otherwise governing, regulation, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands

all or any part of such laws, ordinances, codes resolutions, rules or any other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property...

25 C.F.R. §1.4 (1992).

The Arizona statute at issue in this action would allow the plaintiff to foreclose on the leasehold interest of the Indian tribe. A.R.S. §33-981, et seq. Such foreclosure would impact on the possession rights of the Indian Land in direct contradiction to the above federal laws and the interest of those laws to prevent encumbrance of the Indian lands by the states.[5] Therefore, the state mechanics' lien law is preempted. Bryan, 426 U.S. at 377, 96 S.Ct. at 2105; McClanahan, 411 U.S. at 170-71, 93 S.Ct. at 1261.

IT IS THEREFORE ORDERED THAT:

(1) The defendants' Motion for judgment on the pleadings, treated as a motion for summary judgment, (DOC 6) is granted. The Clerk of Court shall enter judgment for the defendants.

(2) Oral argument scheduled for September 11, 1992 is vacated.

Dated this _____ day of August, 1992.

C.A. Muecke
U.S. District Judge

[5] Nor is the state interest in this case sufficient to justify application of the mechanics' lien law. Presumably, plaintiff has another less intrusive remedy - a contract action in state court against Tempe Trenching. Such action would not encumber Indian lands.

Supreme Court, U.S.
FILED
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No. 94-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GRACE INVESTMENT COMPANY, an Arizona corporation;
CANADIAN IMPERIAL BANK OF COMMERCE,
a foreign corporation,
Petitioners,

v.

RED MOUNTAIN MACHINERY COMPANY,
an Arizona corporation,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES

Respondent Red Mountain Machinery Company is a corporation with no parent companies or subsidiaries to disclose pursuant to Rule 29.1, Rules of the Supreme Court.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

1. STATEMENT RESPECTING JURISDICTION . 2

2. STATEMENT OF THE CASE 4
   - 2.1 Facts 4
   - 2.2 Proceedings in the Lower Courts 7

3. ARGUMENT 9
   - 3.1 Petitioners Have Improperly Invoked This Court's Certiorari Jurisdiction. 9
   - 3.2 The Petition Does Not Raise an Issue Which Merits Plenary Review. 11
   - 3.3 The Ninth Circuit Correctly Found That Red Mountain's Lien Foreclosure Action Was Authorized Pursuant to the Secretary's Regulatory Authority. 12
   - 3.4 The Decision Below Gives Appropriate Deference to Tribal Interests. 19

4. CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Arizona Gunite Builders, Inc. v. Continental Casualty Co., 105 Ariz. 99, 459 P.2d 724 (1969) 6

Basic Refractories v. Bright, 298 P.2d 810 (Nev. 1956) 20

Davis v. Jacobs, 454 U.S. 911 (1981) 9

Demund Lumber Co. v. Franke, 40 Ariz. 461, 14 P.2d 256 (1932) 6

House v. Mayo, 324 U.S. 42 (1945) 9

Jeffries v. Barksdale, 453 U.S. 914 (1981) 10

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 9

Ostrer v. United States, 584 F.2d 595 (D.C. Cir. 1978) 11

Red Mountain Machinery Co. v. Grace Investment Co., 29 F.3d 1408 (9th Cir. 1994) 14, 16

Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) 12

United States v. Nixon, 418 U.S. 683 (1974) 9, 11

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 13

Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983) 17, 18

STATUTES:

25 U.S.C. § 415(a) 14

25 U.S.C. § 415(a) 4

28 U.S.C. § 1254 . . . . . 2, 3, 9, 10, 21

28 U.S.C. § 1291 . . . . . 7, 10

28 U.S.C. § 1331 7

28 U.S.C. § 1367(c) 8

28 U.S.C. § 1441 7

28 U.S.C. § 2101(c) 2, 10

Arizona Revised Statutes § 33-981 6

REGULATIONS:

25 C.F.R. § 162.12(a) 18

25 C.F.R. § 162.14 18

25 C.F.R. § 162.5(c) 15, 18

25 C.F.R. § 1.4(b) 12, 13, 18

RULES:

Rule 10, Rules of the Supreme Court 2, 11

Rule 29.1, Rules of the Supreme Court i

Rule 41, Federal Rules of Appellate Procedure 2, 10, 11

No. 94-690

IN THE
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GRACE INVESTMENT COMPANY, an Arizona corporation;
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a foreign corporation,
Petitioners,

v.

RED MOUNTAIN MACHINERY COMPANY,
an Arizona corporation,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 18, 1994, be denied.

1. STATEMENT RESPECTING JURISDICTION

Petitioners correctly note that the judgment below was entered by the Ninth Circuit Court of Appeals on July 18, 1994. Petitioners mistakenly claim, however, that 28 U.S.C. § 2101(c) and Rule 10 of this Court's rules provide the basis for jurisdiction in this case. Section 2101(c) only prescribes the time for filing a petition for certiorari; Rule 10 simply sets forth various general considerations pertinent to the exercise of certiorari jurisdiction. Presumably, Petitioners rely on the jurisdiction conferred by 28 U.S.C. § 1254 — the statute which permits review by certiorari of "[c]ases in the courts of appeals." This case, however, was no longer "in" the court of appeals when the petition was filed.

Following entry of judgment in the Ninth Circuit Court of Appeals, Petitioners took no steps to stay that court's mandate pending the filing of their petition for certiorari. *See* Rule 41(b), Fed.R.App.P. The mandate therefore issued on August 9, 1994, and the case was remanded to the United States District Court for the District of Arizona for further proceedings. The petition for certiorari was not filed until October 17, 1994, more than two months later. The case has since been remanded by the District Court to Yavapai County Superior Court by Order dated October 24, 1994 (*See* Appendix, p. 27 (A-27)). This case cannot still be considered to be "in the court of appeals"

for purposes of 28 U.S.C. § 1254, and therefore falls outside the Court's certiorari jurisdiction. [1]

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[1] *See* part 4.1 of this Brief for additional discussion of the jurisdictional issue.

2. STATEMENT OF THE CASE

2.1 Facts

On October 7, 1988, Petitioner Grace Investment Company ("Grace") entered into a real estate lease with the Yavapai-Prescott Indian Tribe (the "Tribe"). The Tribe is a federally recognized and protected Indian Tribe, and the lease was entered into pursuant to, and in compliance with, federal statutes and regulations applicable to leases of Indian Lands. 25 U.S.C. § 415(a) (1993); 25 C.F.R. Part 162 (1993). The lease had an initial term of 65 years, renewable for an additional 20 years at Grace's option, and covered approximately 30 acres of Reservation land near Prescott, Arizona.

The purpose of the lease was to facilitate development of multiple-use facilities on the property, including retail, office, lodging, and recreational buildings. Grace was responsible for paying the cost of all construction on the project. In addition, Grace was required "to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction." In order to do so, Grace entered into a construction loan agreement with Petitioner Canadian Imperial Bank of Commerce (the "Bank"). The loan was secured by a mortgage upon Grace's leasehold interest in the project.

By entering the lease, the Tribe granted to Grace the "quiet and undisturbed continued possession of the premises" for the term of the lease. The Tribe also agreed that

Arizona law would apply to most controversies relating to the property. The lease states:

> Lessor agrees that this lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona except in instances where the laws of the United States must govern (except to the extent that such United States law incorporates Tribal law or custom), in which instances the Legal Documents shall be construed in accordance with and governed thereby.

A-15, Lease Agreement, p. 42. The Tribe specifically agreed that any dispute between Grace and any other non-Indian parties, which might affect Grace's leasehold interest, would also be subject to the substantive laws of the State of Arizona.

> Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) may be

> governed by the laws of the State of Arizona or, to the extent applicable, the laws of the United States.

A-16, Lease Agreement, pp. 43-44. The lease was duly executed by the president of the Tribe and the president of Grace, and was approved by the Secretary of the Interior (the "Secretary"), through his authorized representative.

Early in the lease term, Grace undertook to develop a portion of the property into a commercial shopping center called Frontier Village. Grace contracted with a company known as Tempe Trenching to provide certain on-site and off-site water and sewer systems for Frontier Village. Tempe Trenching, in turn, contracted with Respondent Red Mountain Machinery Company ("Red Mountain") for rental of the equipment necessary to perform its contract with Grace. At the conclusion of its work on Frontier Village, Tempe Trenching owed Red Mountain $55,872.14 in unpaid rental charges. Tempe Trenching went out of business and eventually filed a "no-asset" Chapter 7 bankruptcy without paying Red Mountain's claim. As a result, Red Mountain recorded a claim of lien against Grace's interest as lessee, as permitted by Arizona's mechanics' lien law.[2]

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[2] Arizona Revised Statutes § 33-981 (reproduced at A-5 of the Appendix) grants the right to claim such a lien to any person or entity supplying labor, machinery, or materials in connection with a construction project. When the project is under the control of a lessee of the real property, such as Grace, only the leasehold interest of the lessee (and not the fee interest of the lessor) is subject to the lien. *Demund Lumber Co. v. Franke*, 40 Ariz. 461, 14 P.2d 256 (1932). The claim of an entity, such as Red Mountain, renting equipment for use on a construction project, is within the protection of the statute. *Arizona*

2.2 Proceedings in the Lower Courts

On October 22, 1991, Red Mountain filed an action in the Superior Court of the State of Arizona for Yavapai County to foreclose its lien. Petitioners Grace and the Bank were the only defendants named in the Complaint. The Complaint sought foreclosure only against the property of Grace — i.e., the leasehold interest in the Frontier Village shopping center. The Bank was joined as a defendant because the mortgage it holds on Grace's leasehold estate is junior to Red Mountain's lien under state law. The Complaint did not seek foreclosure upon the underlying real estate, and did not join the Tribe as a Defendant.

Grace and the Bank removed the action to federal court under 28 U.S.C. § 1441, asserting federal question jurisdiction under 28 U.S.C. § 1331. They then moved for judgment on the pleadings, claiming that federal Indian law preempted application of the state law claim of Red Mountain. Treating the motion as a motion for summary judgment, the District Court sustained Petitioners' preemption argument and dismissed the action.

Red Mountain took a timely appeal to the Ninth Circuit Court of Appeals, which had jurisdiction of the matter under 28 U.S.C. § 1291. On July 18, 1994, the Ninth Circuit reversed, holding that the Secretary of the Interior and the Tribe, as permitted under the relevant regulations, had approved the application of Arizona's lien

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Gunite Builders, Inc. v. Continental Casualty Co., 105 Ariz. 99, 101, 459 P.2d 724 (1969).

law in this case. The Ninth Circuit remanded the case to the District Court to adjudicate the validity and amount of Red Mountain's lien.

The mandate was issued by the Ninth Circuit on August 9, 1994, returning the litigation to the District Court. On September 28, 1994, Red Mountain filed a motion to remand the action to state court.[3] While this motion was pending, on October 17, 1994, the Petition for Certiorari was filed in this Court. On October 24, 1994, the District Court granted Red Mountain's motion and remanded the action to the Superior Court of Arizona for Yavapai County.

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[3] With the Ninth Circuit having resolved the preemption issue, only state law issues remain for adjudication by the District Court. Accordingly, Red Mountain argued that remand of the matter to the state court from whence it had been removed was appropriate under 28 U.S.C. § 1367(c).

3. ARGUMENT

3.1 Petitioners Have Improperly Invoked This Court's Certiorari Jurisdiction.

This Court's appellate jurisdiction over the courts of appeals is established by 28 U.S.C. § 1254. The statute provides, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

This Court has consistently held that in order for jurisdiction under this statute to exist, the case must be "properly 'in' the court of appeals when the petition for certiorari [is] filed in this Court." *United States v. Nixon*, 418 U.S. 683, 690 (1974). *Accord: Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (where district court's interlocutory order was appealable under "collateral order" doctrine, "the case was 'in' the court of appeals under § 1254 and properly within our certiorari jurisdiction."); *House v. Mayo*, 324 U.S. 42, 44 (1945) (statutory certiorari was unavailable because the case had never been "in" the court of appeals, given the lack of a certificate of probable cause required under statute governing habeas corpus appeals). *Compare Davis v. Jacobs*, 454 U.S. 911, 914 (1981) (Stevens, J., respecting

denial of petitions of writs for certiorari) (recognizing that "the petitioner has incorrectly invoked our jurisdiction under 28 U.S.C. § 1254" where the case was not "in" the court of appeals); *with Jeffries v. Barksdale*, 453 U.S. 914, 915-16 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("Since there was no certificate of probable cause issued in this case, it was never 'in' the court of appeals. . . . Since the case was never in the court of appeals we cannot review it by writ of certiorari to that court.").

There is no dispute that this case was, for a certain period of time, properly "in" the court of appeals. The District Court entered a judgment which was final for purposes of jurisdiction under 28 U.S.C. § 1291, and Red Mountain timely appealed. The problem, however, is that the Petitioners allowed the case to leave the court of appeals before they filed their petition for a writ of certiorari. They did not seek a stay of the Ninth Circuit's mandate pending the filing of their petition, as expressly contemplated by Rule 41(b), Fed.R.App.P.[4] As a result, the mandate issued,

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[4] Under Rule 41(b), the court of appeals may stay its mandate pending the filing of a petition for certiorari in this Court. If the petition is filed before the stay expires, the stay is automatically extended until disposition of the petition. Although the stay is ordinarily limited to a period of 30 days, the court of appeals may grant a longer stay "for cause shown." The rule is thus entirely consistent with the operation of 28 U.S.C. § 2101(c), since the court of appeals could, upon a proper showing, extend the stay of its mandate for the full 90 days permitted for the filing of a petition for certiorari. The drafters of the Federal Rules of Procedure expressly recognized that Rule 41 would, as a practical matter, often require the filing of a petition in less than 90 days from the issuance of the appellate court judgment. "Although 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after the entry of judgment, seven of the eight circuits which now regulate the matter stays

bringing the proceedings "in" the court of appeals to a close. *Ostrer v. United States*, 584 F.2d 595, 598 (D.C. Cir. 1978) (issuance of the mandate "removes [the case] from the jurisdiction" of the court of appeals).

Because this case was not "'in' the court of appeals when the petition for certiorari was filed," *United States v. Nixon, supra*, 418 U.S. at 743, the writ should be dismissed for want of jurisdiction.

3.2 The Petition Does Not Raise an Issue Which Merits Plenary Review.

Even assuming jurisdiction is proper, the petition fails to show why a writ of certiorari should issue. None of the general grounds for granting a petition, as set forth in Rule 10, Sup.Ct.R., are present: Petitioners do not claim that the Ninth Circuit's decision is in conflict with any decision of this Court, any other circuit court, or the high court of any state. Petitioners do not allege that the lower court "has so far departed from the accepted and usual course of judicial proceeding" that "an exercise of this court's power of supervision" is required. Nor does the case present "an important question of federal law which has not been, but should be, settled by this court."

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pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule." *Advisory Committee Note*, Rule 41, Fed.R.App.P., 43 F.R.D. 119, 157 (1967).

Petitioners simply disagree with the result reached below. That result, however, was compelled by both federal regulation and the terms of the lease at issue in this case. Federal regulation requires that leases of Indian land must provide a means of assuring payment of the claims of laborers and suppliers. The lease here unmistakably contemplated the filing of lien claims encumbering the project, and specifically required Grace to pay all such claims. The lease also afforded to *all* encumbrancers the benefits and protection of the state law of Arizona.

The Tribe, the Secretary, and the Petitioners themselves all agreed to the terms of the lease. Since the Secretary has express authority to approve the application of state law "in specific cases," 25 C.F.R. § 1.4(b), the fact that the Secretary approved this lease disposes of the preemption argument. As the Ninth Circuit quite properly held, on the facts of this case, the foreclosure action brought by Red Mountain against Grace and the Bank is not preempted by federal Indian law.

3.3 The Ninth Circuit Correctly Found That Red Mountain's Lien Foreclosure Action Was Authorized Pursuant to the Secretary's Regulatory Authority.

There is no argument that federal law preempts most state laws affecting activity on Indian land. *See generally*, W. Canby, *Civil Jurisdiction on the Indian Reservation*, 1973 UTAH L. REV. 206, 207-08. However, this Court "long ago departed from the 'view that the laws of [a state] can have no course within reservation boundaries.'" *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390

(9th Cir. 1987), *quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). Moreover, the Secretary may "adopt or make applicable to Indian lands all or any part" of any state law, "in specific cases or in specific geographic areas," as may be found to be "in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. § 1.4(b).

The fundamental holding of the court of appeals in this case was simply that the Secretary had exercised the authority granted to him under 25 C.F.R. § 1.4(b) to make Arizona's mechanics' lien applicable to disputes between non-Indian developer Grace and its non-Indian subcontractors such as Red Mountain. As the Ninth Circuit explained:

> The lease between Grace and the Tribe, which was approved by the Secretary, specifically adopts the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project:
>
> > *Lessor agrees that this lease . . . and any encumbrances thereof*, and any subleases, assignments or other contracted agreements with respect thereto *. . . shall be construed in accordance with the substantive law of the State of Arizona.*

Red Mountain Machinery Co. v. Grace Investment Co., 29 F.3d 1408, 1411 (9th Cir. 1994) (emphasis original). The Ninth Circuit went on to note that the lease generally "provides that disputes between Grace and other non-Indian parties . . . may be subject to state law." *Id.* As a result, the Ninth Circuit concluded that "by approving the lease that contained these provisions, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law." *Id.*

The Ninth Circuit was also correct in concluding that application of the state mechanics' lien laws was in harmony with the policies reflected in federal regulation of leases of Indian lands. Prior to 1955, federal law permitted only short-term leases of Indian land, and generally under limited conditions. *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1068-75 (1974). These restrictions "discouraged lessees from obtaining long-term construction financing and had thus foreclosed uses of land which required substantial investment." *Id.* at 1074-75.

With legislation enacted in 1955, PUB. L. NO. 255, CH. 615, 69 STAT. 539 (codified at 25 U.S.C. § 415(a)), modern federal policy favoring long-term Indian land leases began to take shape. The 1955 Act permitted leasing of all Indian land for up to 50 years, for a wide variety of commercial, industrial, and residential purposes. *Id.* Congress chose to encourage construction and development through long-term leases, as a means to increase Indian income. Chambers & Price, *supra*, 26 STAN. L. REV. at 1074.

Ensuring compensation to the workers and subcontractors who contribute to such construction projects furthers this goal. Accordingly, federal regulation requires the lessee to provide assurances, satisfactory to the Secretary, that the claims of subcontractors and suppliers will be paid. 25 C.F.R. § 162.5(c) (1992).[5] When suppliers and subcontractors on one project are promptly paid, they and others are encouraged to bid aggressively on future developments on leased Indian land. The long-term result is to keep the costs of such development competitive, thus furthering the Congressional goal of promoting commercial leasing of Indian land.

Grace's effort to prevent supplier Red Mountain from being paid is contrary not only to federal regulation, but also to its own agreement with the Tribe. The lease in this case complied with 25 C.F.R. § 162.5 by requiring Grace "to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction," and to secure this guaranty through one of four means. A-10, Lease Agreement, p.14. Grace could furnish either: (1) the bond of a corporate surety to pay "claims for all persons for work

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[5] The regulation provides, in part:

> Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:
>
> . . .
>
> (2) The estimated construction cost of any improvement to be placed on the land by the lessee.

performed on or materials furnished for construction"; or (2) an escrow deposit of cash or government securities "in an amount sufficient to pay the entire cost of construction," which would be used to discharge "any statutory liens for labor or material"; or (3) a construction loan agreement under which a "financial institution agrees to provide an amount sufficient to pay the entire cost of construction"; or (4) a letter of credit for the entire cost of the project, "conditioned on satisfactory completion of and payment for construction." A-10-12, pp. 14-16.

Electing not to deposit cash in escrow "until the period fixed by law for the filing of all mechanics' or materialmen's liens on such improvement shall have expired," Grace chose instead to obtain a construction loan, from which Grace promised to pay the claims of all subcontractors and suppliers on the Frontier Village project. A-11, Lease Agreement, p. 15. The loan agreement required Grace to "pay and discharge" all mechanics' liens, and provided that Grace would be in default if it failed to do so. A-22, A-25-26, Building Loan Agreement, pp. 10, 24, 36. Given this explicit language, the Ninth Circuit properly concluded that, pursuant to federal regulations and Grace's express obligation, it had been the Secretary's intention to authorize lien claimants such as Red Mountain to pursue their state law remedies against the leasehold interest of Grace. 29 F.3d at 114.

Petitioners do not dispute the Ninth Circuit's legal analysis in this case, but urge that the lower court misread the text of the Lease Agreement. Petitioners contend that the provisions permitting application of Arizona law pertain only

to the mortgage held by the Bank, and not to the lien asserted by Red Mountain. Petition at 4-7. The pertinent language of the Lease, however, is not so narrowly drafted.

Section 14 of the Lease expressly recognized Grace's right to voluntarily encumber its leasehold interest "for the purpose of borrowing for the development and improvement of the property." A-13, Lease Agreement, p. 23. Thereafter, the Lease makes repeated reference to the "approved encumbrance" of the leasehold interest whenever it discusses the rights of the construction lender. A-13-15, Lease Agreement, pp. 24-26. This restrictive language is conspicuously absent from the choice of law provision of the lease, which applies without qualification the substantive law of the State of Arizona to "*any* encumbrances."

In addition, the lease itself shows that the term "any encumbrancer" was intended to encompass more than just the Bank: the lease specifies that "any encumbrancer" "*includes, without limitation*, any rights dealing with any sale, foreclosure or other enforcement of any security instrument." Grace thus seeks to impose a limitation expressly rejected by the lease. Petitioners' argument that Arizona law was meant to apply only to the rights of the Bank must be rejected.

Nor does the Ninth Circuit's decision in this case conflict with that court's prior decision in *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), as Petitioners contend. Petition at p. 7-8. In *Yavapai-Prescott*, the Tribe argued that the Secretary's approval of the lease implicitly suspended the operation of regulations governing

lease termination procedures. 707 F.2d at 1074. The regulations required the Secretary's participation in lease termination decisions, while the lease in that case simply referred to termination by the Tribe "and/or" the Secretary. The Ninth Circuit refused to treat approval of the lease as having "authorized suspension of the procedures required by 25 C.F.R. § 162.14," pointing out that "an agency normally is bound by its own regulations." 707 F.2d at 1076 n.5. This case does not involve any claim of "implied waiver" of a federal regulation. Rather, the Ninth Circuit held that the choice of law clause in this lease was an appropriate exercise of the authority granted by 25 C.F.R. § 1.4(b) to make state law applicable "in specific cases." Furthermore, the application of the state lien law is in furtherance of, rather than at odds with, the federal policy, as discussed above, of requiring assurances that the claims of subcontractors and suppliers will be paid. 25 C.F.R. § 162.5(c) (1962).[6] The result sought by Grace defeats that policy.

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[6] Finally, Petitioners point out that "the lease is not signed by the Secretary of the Interior; it is signed by the acting Phoenix Area Director of the Bureau of Indian Affairs." Petition at 7. From this statement, Petitioners seem to imply that the lease was not actually approved "by the Secretary, or his authorized representative," as required by federal regulation. 25 C.F.R. § 162.12(a). Petitioners cannot seriously contend that the lease in this case was not properly approved by the Secretary. Without such approval, the lease would be entirely invalid, Grace's occupation of the property would be an act of trespass, and any litigation between Red Mountain and Grace would not involve any federal issue whatsoever.

3.4 The Decision Below Gives Appropriate Deference to Tribal Interests.

Petitioners appear to concede that the Ninth Circuit correctly concluded that a foreclosure here will have no economic impact on the Tribe. Petition at 12. Petitioners argue, however, that the Ninth Circuit gave insufficient consideration to other tribal interests. A foreclosure of Red Mountain's lien, Petitioners contend, might impinge on tribal interests by allowing an unwanted stranger to become the Tribe's tenant. The Lease Agreement, however, expressly contemplates just such an event.

The lease acknowledges Grace's right to encumber the leasehold interest in order to finance construction of the shopping center. A-13, Lease Agreement, p. 24. With an encumbrance, of course, comes the possibility of foreclosure on the encumbered asset. In light of this possibility, the Lease recognizes that Grace's interest may be acquired by a previously unknown entity, either by direct purchase at the lender's foreclosure sale or by assignment from the lender. The Lease imposes no prohibition against such an occurrence, and specifically provides that:

> [I]f the purchaser at such sale is the encumbrancer, *the encumbrancer may sell and assign the leasehold interest without the consent of the lessor and/or the secretary*, provided that the assignee shall agree in writing to be bound by all the terms and conditions of the sublease agreement or this lease agreement, as applicable. If the

> purchaser *is a party other than the encumbrancer*, the purchaser may sell and assign the leasehold interest only with the written consent of the Secretary, and such purchaser shall be bound by all the terms and conditions of the sublease or this lease agreement, as applicable, and shall assume in writing all obligations thereunder.

Id., A-13-16, pp. 25-26 (emphasis added). The only "burden" Petitioners claim this case imposes on the Tribe, therefore, is simply a possible occurrence the Tribe agreed to accept when it leased its property out for development.[7]

---

[7] *See Basic Refractories v. Bright*, 298 P.2d 810 (Nev. 1956), rejecting the argument that foreclosure against the leasehold should be denied because the government would be "compelled against its consent to accept an unwanted tenant, such as a purchaser upon foreclosure sale." 298 P.2d at 814. After reviewing the lease, the court concluded that, as here, "the government was not concerned with a lien foreclosure and its consequent substitution of another tenant." 298 P.2d at 815.

4. CONCLUSION

This case is not within the Court's certiorari jurisdiction under 28 U.S.C. § 1254. Because Petitioners took no steps to stay the issuance of the lower court's mandate, this case was not "in" the court of appeals by the time the petition for certiorari was filed. Accordingly, the petition should be dismissed for want of jurisdiction.

Even if considered on its merits, the petition fails to raise an issue for which issuance of a writ of certiorari would be appropriate. Payment of mechanics' lien claims is required by federal regulation. The lease specifically obligates Grace to pay such claims. The lease provides that the rights of all encumbrancers are governed by the state law of Arizona. Red Mountain, as a mechanics' lien claimant, is such an encumbrancer, and is therefore entitled to proceed under the state mechanics' lien law.

The Ninth Circuit carefully followed existing law and issued a decision narrowly confined to the facts of the present case. The decision is consistent with the rulings of this Court and the other federal courts of appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

WRIGHT & ASSOCIATES
LAWRENCE C. WRIGHT
Counsel of Record

LEE ALLEN JOHNSON, P.C.
LEE ALLEN JOHNSON

APPENDIX

APPENDIX

Table of Contents

Table of Contents A-1

28 U.S.C. § 1254 . . . . . A-2

25 C.F.R. § 1.4 . . . . . A-3

25 C.F.R. § 162.5(c) and (d) A-4

Arizona Revised Statutes § 33-981 . . . . . A-5

Excerpts from Lease Agreement A-7

Excerpts from Building Loan Agreement A-18

Order of Remand to State Court A-27

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

§ 1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

§ 162.5 Special requirements and provisions.

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises; the lessee may also be required to furnish appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

§ 33-981. Lien for labor; professional services or materials used in construction; alteration or repair of structures; preliminary twenty day notice; exceptions

A. Except as provided in §§ 33-1002 and 33-1003, every person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

C. A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, chapter 10[1] shall not have the lien rights provided for in this section.

---

[1] Section 32-1101 et seq.

D. A person required to give preliminary twenty day notice pursuant to § 33-992.01 is entitled to enforce the lien rights provided for in this section only if he has given such notice and has made proof of service pursuant to § 33-992.02.

E. A person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1,[2] shall not have the lien rights provided for in this section.

F. A person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has a written agreement with the owner of the property or with an architect who has a written agreement with the owner of the property.

---

[2] Section 32-101 et seq.

YAVAPAI-PRESCOTT INDIAN TRIBE/ GRACE INVESTMENT COMPANY LEASE AGREEMENT NO. 101

YAVAPAI-PRESCOTT INDIAN TRIBE/
GRACE INVESTMENT COMPANY
LEASE AGREEMENT No. 101

TABLE OF CONTENTS

			Page
1.	TERM		2
	A.	Base Term	2
	B.	Option to Renew	2
2.	RENT		3
	A.	Base Annual Rent	3
	B.	Additional Rent	3
	C.	Definitions	4
3.	PAYMENT OF RENTS		5
4.	LEASE AGREEMENT SUBJECT TO APPROVAL OF SECRETARY OF THE INTERIOR		6
5.	SUBLEASES, ASSIGNMENTS AND TRANSFERS		6
	A.	Short-Term Subleases	6
	B.	Long-Term Subleases	7
	C.	Assignments and Transfers	7
	D.	Multiple Leases	9
	E.	Consent of Sureties	10
	F.	Assignments or Transfers of Stock in Lessee	10
6.	PROCEDURE FOR APPROVAL OF SUBLEASE, ASSIGNMENT OR TRANSFER FOR WHICH APPROVAL IS REQUIRED		11
	A.	Consent Procedures	11
	B.	Failure to Approve or Disapprove	13
	C.	Attornment and Recognition Agreements	14

7. SECURITY FOR PERFORMANCE 14
A. Methods of Providing Security 14
B. Corporate Sureties 16
8. COMPLIANCE WITH LAWS AND WORKMAN'S COMPENSATION 16
9. DEVELOPMENT OF IMPROVEMENTS 17
A. Multiple Use Facilities 17
B. Approval Requirement 17
C. Approval Procedures 18
D. Alterations 19
E. Progress Reports 19
10. RELEASES OF LEASED PROPERTY 20
A. Releases 20
11. OWNERSHIP OF IMPROVEMENTS 20
12. SERVICES AND UTILITIES 22
13. AGREEMENT FOR UTILITY FACILITIES 22
14. ENCUMBRANCES 23
15. TAXATION AND TRIBAL LAWS 27
16. REPAIRS AND MAINTENANCE 29
17. LIABILITY INSURANCE 30
18. FIRE AND CASUALTY INSURANCE 30
19. DESTRUCTION OF IMPROVEMENTS 31
20. CONDEMNATION 32
21. ABANDONMENT AND BANKRUPTCY 34
22. COMMUNITY SERVICES 35
23. REMEDIES IN THE EVENT OF DEFAULT 35
24. HOLDING OVER 39
25. INSPECTION 39
26. ACCOUNTING AND AUDITS 40
A. Books and Records 40
B. Audit 41
27. RIGHT OF SUBROGATION 41
28. WAIVER 42
29. WAIVER OF SOVEREIGN IMMUNITY 42
30. ATTORNEYS' FEES 45

31. TERMINATION OF FEDERAL TRUST 45
32. OBLIGATIONS OF LESSEE 46
33. LAWFUL USES 46
34. ALCOHOLIC BEVERAGES 46
35. PAYMENTS AND NOTICES 47
36. HEIRS AND SUCCESSORS IN INTEREST 48
37. SEVERABILITY 48
38. CONSENTS 48
39. NEGATION OF PARTNERSHIP. 48
40. ENTIRE AGREEMENT 49
41. ESTOPPEL CERTIFICATES 49
42. INTEGRATED AGREEMENT-ADDITIONAL DOCUMENTS 50
43. COVENANT OF QUIET ENJOYMENT 50
44. SIGNS 51
45. FORCE MAJEURE 51
46. TITLE REPORT AND INSURANCE 51
47. RECORDATION 53
48. INDIAN PREFERENCE FOR EMPLOYMENT . . . 53
49. COMPLIANCE WITH FEDERAL LAW 54
A. 25 U.S.C. § 81 54
B. 25 U.S.C. § 415 54
C. 25 C.F.R. § 162 55

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[p. 14]

7. SECURITY FOR PERFORMANCE

A. Methods of Providing Security. Before beginning construction of each improvement, the Lessee, a sublessee (which term when used herein shall include all ground sublessees whether tenants of Lessee or of sublessees of tenants of Lessee) or the contractor performing the work for the Lessee or a sublessee agrees to provide security to guarantee completion of the improvement and payment in full of claims of all persons for work performed on or materials furnished for construction. The Lessee,

a sublessee or the contractor performing the work for the Lessee or a sublessee may provide said security in any of the following forms:

(1) Posting a corporation surety bond in an amount equal to the cost of each improvement, said bond to be deposited with the Lessor and to remain in effect until the improvement is satisfactorily completed and payment has been made in full of the

[p. 15]

claims of all persons for work performed on or materials furnished for construction. Said bond shall be conditioned upon the faithful performance of the Lessee, a sublessee or the contractor performing the work for the Lessee or a sublessee, and give all claimants the right of action to recover upon said bond in any suit brought for that purpose;

(2) Depositing in escrow with an institution acceptable to the Lessor, negotiable United States Treasury Bonds or cash, in an amount sufficient to pay the entire cost of construction of each improvement then to be erected. The escrow instructions shall include provisions for disbursement in installments upon certification of the architect as construction progresses. The Lessor shall have access to all information relative to the disbursement of funds through said escrow. The escrow instructions shall also provide that not less than ten percent (10%) of such funds shall be withheld by the escrow holder until the period fixed by law for the filing of all mechanic's or materialmen's liens on such improvement shall have expired or until an acceptable title company issues a title insurance policy which in substance insures the Lessor against any loss it could sustain by reason of any statutory liens for labor or material arising out of any work or improvement described in said escrow instructions; that if mechanic's or materialmen's liens are filed, the funds so withheld shall then be used to discharge such liens; and that if no such liens are filed within the statutory period for filing, the withheld funds

shall be then disbursed to the party originally posting the same. Interest on said bonds shall be paid to the party posting the same.

(3) Entering into a building loan agreement with a Federally insured financial institution under which agreement, such financial institution agrees to provide an amount sufficient to pay the entire cost of construction of each improvement then to be erected.

(4) Obtaining a letter of credit payable to the Tribe from a Federally insured financial institution, in an amount sufficient to pay the entire cost of construction of each improvement then to be erected, conditioned on satisfactory completion of and payment for construction of the improvements and in a form which is satisfactory to the Tribe; or

(5) Such other method as may hereafter be mutually agreed between Lessor and Lessee.

B. Corporate Sureties. All corporate surety bonds provided by Lessee in compliance with this Lease Agreement shall be furnished by companies holding certificates of authority from the Secretary of Treasury as acceptable sureties on Federal bonds. Insurance policies shall be furnished and maintained by companies doing business in the State of Arizona, rated the equivalent of A-Plus - AAA or better by Best's Insurance Guide or otherwise approved by the Tribe.

* * *

[p. 23]

14. ENCUMBRANCES

Lessee's interest in this Lease Agreement, and any right to or interest in, any of the improvements on the Leased Property, may be encumbered for the purpose of borrowing for the development and improvement of the Leased Property and may be refinanced from time to time in Lessee's discretion. Any encumbrance must be confined to the fair market value of the improvements on the Leased Property and shall not jeopardize in any way

[p. 24]

the Lessor's interest in the land. Lessee agrees to provide Lessor and the Secretary with reasonable financial information in conjunction with any request for approval of any encumbrance. The parties agree that their mutual interests will be best served through the Lessee having the ability to enter into such encumbrances as it deems appropriate and that any required approvals will not be unreasonably withheld or delayed. The Lessor and Secretary or his designee shall approve such encumbrance instruments if it meets the requirements of the applicable statutes and regulations.

It is understood that any sublessee shall have the right to encumber its sublease for the purpose of borrowing money for the development and improvement of the property subject to the sublease without any further consent of the Lessor or the Secretary; provided that the form of the encumbrance shall be approved by the Secretary and the Tribe.

In the event of default by the Lessee of the terms of any approved encumbrance, or in the event of a default by a sublessee, the encumbrancer (the holder of the beneficial interest under a deed of trust, an assignee under an assignment of lease as security, or a mortgagee) may exercise any rights provided in the applicable encumbrance; provided that before any sale of the leasehold or subleasehold, whether under power of sale or foreclosure, the encumbrancer shall give to the Lessor notice of the

[p. 25]

same character and duration as is required to be given to the Lessee or a sublessee by such encumbrance and any applicable laws of the State of Arizona. In the event of a default under an approved encumbrance of this lease (but not any encumbrance of a sublease), Lessor shall, upon request by the encumbrancer, suspend and waive all rental payments due to Lessor by Lessee for a period not to exceed twelve (12) months from the date of default; provided, however, that once such suspension and waiver has occurred, no additional period of suspended payments will be

granted by Lessor until such time as all rental payments and interest under any previous suspensions have been satisfied and cured in full. Any such suspended rental payments shall be paid in full with interest at the rate of twelve percent (12%) no later than thirty-six (36) months from the date of default.

If any sale under an encumbrance of a sublease or an approved encumbrance of the leasehold granted hereunder occurs, whether by power of sale or foreclosure, the purchaser at such sale shall succeed to all of the rights, title and interest of the Lessee or a sublessee in the leasehold interest covered by said encumbrance. It is further agreed that, if the purchaser at such sale is the encumbrancer, the encumbrancer may sell and assign the leasehold interest without the consent of the Lessor and/or the Secretary, provided that the assignee shall agree in writing to be bound by all the terms and conditions of the sub-

[p. 26]

lease agreement or this Lease Agreement, as applicable. If the encumbrancer is the purchaser, it shall be required to perform this lease or any sublease, as applicable, only so long as it retains title thereto. If the purchaser is a party other than the encumbrancer, the purchaser may sell and assign the leasehold interest only with the written consent of the Secretary, and such purchaser shall be bound by all the terms and conditions of the sublease or this Lease Agreement, as applicable, and shall assume in writing all obligations thereunder.

In the event of a default under an approved encumbrance of this Lease, and after notice of sale by the approved encumbrancer has been given as above provided, if the default upon which notice of sale is based shall continue for sixty (60) days without being cured by the holder of the leasehold estate, Lessor shall have the right to cure such defaults at any time prior to foreclosure, and to discharge the approved encumbrance by paying to the encumbrancer the amount of principal and accrued interest which remain unpaid. In such event, Lessor may then elect to terminate this Lease; provided, however, if any subleases

exist at such time. Lessor may not terminate this Lease unless Lessor agrees in writing to recognize the sublease as if Lessor were the original lessor thereunder and covenants to grant all such sublessees' quiet possession of their respective subleaseholds for so long as such sublessees attorn to and pay their rents to Lessor and otherwise abide by the terms of their respective sublease agreements. The foregoing provision shall not be construed

* * *

[p. 42]

29. WAIVER OF SOVEREIGN IMMUNITY

Lessor agrees that this Lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona except in instances where the laws of the United States must govern (except to the extent that such United States law incorporates Tribal law or custom), in which instances the Legal Documents shall be construed in accordance with and governed thereby. Any controversies or disputes arising under the Legal Documents, except as to those which the parties may hereafter agree may be determined by arbitration, may be determined and adjudicated in the United States District Court for the District of Arizona or in the event the federal court shall refuse jurisdiction or the parties shall not be entitled to such jurisdiction, the Arizona Superior Court, Yavapai County. For the

[p. 43]

purposes of this paragraph and subject to the condition hereinafter contained, Lessor hereby (for only the benefit of any of the parties hereto and their successors and assigns, including without limitation, all assignees, licensees, sublessees and the respective encumbrancers of all such parties) waives any immunity it may possess and hereby submits itself to the jurisdiction of the aforesaid courts and expressly (i) waives and relinquishes any right

it may have to have any controversy or dispute arising under the Legal Documents determined in any Tribal court or under Tribal law or custom, and (ii) covenants that it will not in any manner seek to have the Legal Documents or its rights or obligations thereunder or hereunder enforced or adjudicated in any Tribal court or under Tribal law. The United States and Arizona courts set forth above, as the agreed forums for controversies hereunder, shall not be bound by any Tribal law, regulations, ordinances or custom in construing the Legal Documents or adjudicating the rights of the parties thereunder. Lessor hereby waives and relinquishes any Tribal jurisdiction it might have relative to the enforcement or adjudication of rights between Lessor and Lessee or any encumbrancer, sublessee or assignee of Lessee, or to have any such rights enforced, adjudicated or enjoined in Tribal courts or under Tribal law or custom. Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under)

[p. 44]

any security instrument, or executed and delivered in connection therewith) may be governed by the laws of the State of Arizona or, to the extent applicable, the laws of the United States. In entering into the agreements and waivers contained in this paragraph, Lessor acknowledges that such agreements and waivers are made, in part, to induce Lessee to enter into a development lease. Nothing in this paragraph shall limit, or be deemed to limit, any party's right to appeal any judgment to any appropriate federal or state appellate court. Nothing in this paragraph shall be construed to require any party or encumbrancer to resort to any judicial forum to enforce any of its rights hereunder or under any security instrument executed or delivered in connection herewith, if the same are enforceable without resort to judicial action. Notwithstanding anything in this paragraph to the contrary, it is understood and agreed that any relief sought against Lessor may

only be for declaratory judgment and injunctive relief and a money judgment; provided, however, no money judgment shall be entered against the Lessor unless it shall be specifically made enforceable only by set-off against sums due or to become due by Lessee or an assignee or sublessee or the respective encumbrancers of such parties to Lessor. The Tribe's consent to jurisdiction herein given shall not be construed to give the court jurisdiction to enter a money judgment against the Tribe which is enforceable by execution, garnishment or in any other manner, except by set-off against sums due or to become due to Lessor. Lessor and Lessee agree that any termination proceeding

[p. 45]

shall be conducted in accordance with and governed by the rules and regulations set forth in the United States Code of Federal Regulations and any applicable federal judicial decisions relative to this type lease agreement. In the event that the provisions for waiver of sovereign immunity set forth herein shall be held to be void or unenforceable, then whenever during the term of this Lease, Lessor and Lessee are unable to reach an agreement with respect to any matter in dispute, and if by reason of the exercise by Lessor of its sovereign immunity or for any other reason the forums of the federal and state courts are unavailable, then and in any such event such matter in dispute shall be submitted to arbitration under the then applicable rules of the American Arbitration Association. Lessor and Lessee agree to be bound by any final award entered pursuant to such arbitration, which award may include an assessment of costs and/or attorneys' fees.

Excerpts from Building Loan Agreement

BUILDING LOAN AGREEMENT

Between

GRACE INVESTMENT COMPANY
as Borrower

and

CANADIAN IMPERIAL BANK OF COMMERCE
as Lender

October 31, 1990

BUILDING LOAN AGREEMENT[1]

IN CONSIDERATION of the covenants herein contained, Lender (defined below) agrees to lend to Borrower (defined below), and Borrower agrees to borrow from Lender, up to the full amount of the Loan hereinafter described, on the terms and conditions of this Building Loan Agreement ("Agreement") as follows.

Article 1 - Fundamental Provisions

1.1 Purpose: This Article 1 sets forth certain fundamental provisions for purposes of this Agreement.

1.2 Date of this Agreement: October 31, 1990.

1.3 Lender: CANADIAN IMPERIAL BANK OF COMMERCE, a Canada chartered bank acting by and through its Atlanta Agency.

1.4 Borrower: GRACE INVESTMENT COMPANY, an Arizona corporation.

1.5 Loan: A construction loan to be made by Lender to Borrower, subject to the terms of this Agreement and the other Loan Documents, in the principal amount of up to $_____ ("Principal Amount"), together with all interest thereon and any additional advances related thereto.

1.6 Borrower's Funds at Recordation: None.

1.7 Property: That certain real property located in the County of Yavapai, State of Arizona, more particularly described on Exhibit "A" attached hereto.

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[1] The amount of the loan does not appear in the record. Grace and the Bank refused to produce the loan documents until ordered to do so. The District Court ordered the documents produced, but allowed Grace and the Bank to redact all figures reflecting loan amounts, interest rates, etc.

1.8 Improvements: A community shopping center of approximately 275,000 square feet to be known as "Frontier Village Center" (the "Project").

1.9 Commencement Date: That date which is seven days after the date of this Agreement as shown above.

1.10 Completion Date: That date which is eight months from the Commencement Date.

1.11 Change Order Amount: $_____

1.12 Aggregate Change Order Amount: $_____

1.13 Architect: Ellerman & Schick and Associates.

1.14 General Contractor: Borrower.

* * *

[p. 8]

Article 5 - Conditions Precedent to Disbursement

5.1 In General. Lender shall have the election to make disbursements upon the satisfaction of the following conditions precedent, and neither Borrower nor any third party including, without limitation, any guarantors, any construction manager, any subcontractors, materialmen, the Architect or any junior lienholders shall be entitled to rely on the satisfaction or non-satisfaction of such conditions precedent for purposes of determining the priority of any disbursement made pursuant to this Agreement:

5.1.1 All Conditions to Recordation shall have been satisfied, and Recordation shall have occurred.

5.1.2 There shall exist no Event of Default nor any event, omission or failure of a condition which would constitute an Event of Default after notice or the lapse of time or both.

5.1.3 All representations and warranties of Borrower made in this Agreement or in any of the other Loan Documents shall be true and correct as of the date of the disbursement with the same effect as if made on such date.

5.1.4 The Loan shall be In Balance as defined in Article 6 hereof.

5.1.5 Borrower shall have delivered to Lender all funds, documents, instruments, policies, evidence of satisfaction of conditions and other materials requested by Lender under the terms of this Agreement or any of the other Loan Documents.

5.1.6 All requirements for the particular disbursement set forth in the Disbursement Schedule and other applicable sections of this Article 5 shall have been met.

5.1.7 If the disbursement is for any Tenant Improvements, Lender shall have received and approved: (a) the original or signed counterpart of the lease or leases pursuant to which such Tenant Improvements have been installed; (b) if requested by Lender, all plans and specifications for such Tenant Improvements signed or initialed by Borrower, the applicable architect, contractor, tenant and other Persons, as Lender may

[p. 9]

require; and (c) such line item breakdowns of the costs incurred for such Tenant Improvements as Lender may request.

5.2 Initial Disbursement. Prior to the Initial Disbursement, and as conditions precedent thereto subject to the election of Lender in Section 5.1 hereof:

5.2.1 All conditions precedent set forth in Paragraph 5.1 shall have been satisfied.

5.2.2 The Title Insurer shall have issued or committed to issue the Title Policy.

5.2.3 A Form UCC-1 financing statement shall have been filed with the Secretary of State for the State of Arizona, and Lender shall have been furnished with a certificate issued by the Secretary of State showing Lender's UCC-1 financing statement as prior to all other UCC-1 financing statements in Borrower's name related to the Personal Property.

5.2.4 A Form UCC-1 financing statement shall have been filed or recorded with the County Recorder or other

appropriate official of Yavapai County if required by law in order to perfect the security interest in the Personal Property.

5.2.5 Unless this requirement is waived in writing by Lender, Borrower shall require each subcontractor whose subcontract calls for payment of more than $150,000 to post a performance and completion bond prior to commencing work. Any bond required hereunder shall be recorded in the Office of the County Recorder of Yavapai County prior to the commencement of the subcontractor's work on the Improvements.

5.2.6 Prior to the delivery to Lender of complete Plans and Specifications and their approval by Lender, Lender shall not be required to make disbursements under this Loan Agreement exceeding in the aggregate the amount of the Letter of Credit.

5.3 Subsequent Disbursements. Prior to each Subsequent Disbursement, and as conditions precedent thereto, subject to the election of Lender in Section 5.1 hereof:

5.3.1 All conditions precedent set forth in Paragraphs 5.1 and 5.2 shall have been satisfied.

5.3.2 If required by Lender, the Title Insurer shall have agreed to issue an endorsement to the Title Policy insuring Lender that: (a) since the previous disbursement by Lender or issuance of insurance related thereto, there has been no change in the condition of title; (b) there are no intervening liens or encumbrances which may then or thereafter take priority over the disbursement to be made; and (c) there are no survey

[p. 10]

exceptions not theretofore approved by Lender.

5.3.3 Upon the completion of foundations for the Improvements, the Title Insurer shall have issued its foundation endorsement insuring Lender that each foundation is constructed wholly within the boundaries of the Property and does not encroach on any easements or violate any covenants, conditions or restrictions of record.

5.3.4 The Improvements shall not have been injured or damaged by fire or other casualty, unless Lender shall have received insurance proceeds sufficient, in its judgment, to restore the improvements and to permit the completion of the Improvements prior to the Completion Date specified in Section 1.10.

5.3.5 Lender shall have received certification from the Architect and/or Lender's Consultant that: (a) the Work with respect to which the disbursement has been requested has been completed in accordance with the Plans; (b) barring then unforeseen and unknown delays, the then existing state of construction of the Improvements will permit the Completion of the Improvements on or before the Completion Date; and (c) the costs remaining to be paid to complete the Project will not exceed the Undisbursed Loan Amount.

5.3.6 Lender shall have received unconditional lien releases upon progress payments from each contractor, subcontractor and supplier of materials and services, with respect to whom any previous disbursement has been made by Lender, confirming each such Person's receipt of its proper share of each such previous disbursement and its waiver of any further claim to the extent thereof.

5.4 Retainage Disbursement. Prior to the Retainage Disbursement, and as conditions precedent thereto, subject to the election of Lender in Section 5.1 hereof:

5.4.1 All conditions precedent set forth in Sections 5.1 through 5.3 shall have been satisfied.

5.4.2 Lender shall have received certification from the Architect and/or Lender's Consultant that the Improvements have been substantially completed in accordance with the Plans.

5.4.3 Borrower shall have recorded a valid notice of completion of the Improvements.

5.4.4 Such additional policies or endorsements shall have been issued by the Title Insurer as Lender may reasonably require, with a liability limit of not less than the

[p. 11]

Principal Amount, and with coverage and in form satisfactory to Lender, insuring Lender's interest under the Deed of Trust as a first lien on the Borrower's leasehold interest in the Property without exception for mechanic's or materialmen's liens and claims, excepting only such matters as shall have been approved in writing by Lender.

5.4.5 Borrower shall obtain and deliver to Lender evidence of approval of the Improvements in their entirety for permanent occupancy by all applicable Governmental Authorities, and by any applicable Board of Fire & Underwriters or its equivalent.

The Retainage Disbursement may be made upon completion of the Improvements and satisfaction of the conditions specified in this Section 5.4 with respect thereto, notwithstanding the fact that Tenant Improvements have not been completed, but in any such event the Final Disbursement shall be made in the same manner as funds were disbursed for the payment of other costs of construction of the Improvements and as provided in this Agreement and the Disbursement schedule with respect to Tenant Improvements.

5.5 Disbursements for Offsite Materials. In no event shall Lender be obligated to make any disbursements of Loan proceeds to pay for any materials connected with the construction of the Improvements unless and until such materials are delivered to the Property or are incorporated in the Project. If Lender in its sole discretion makes a disbursement for materials stored off-site, all of the requirements of Section 5.3 shall be applicable to such disbursement (in addition to other requirements for disbursements contained herein). Notwithstanding the foregoing, in no event shall Lender be obligated to disburse Loan proceeds with respect to materials stored offsite in excess of $_____.

5.6 Disbursements for Materials Stored On-Site. Any requests for disbursements which in whole or in part relate to materials, equipment or furnishings which Borrower owns and which are not incorporated into the Improvements as of the date of the request for disbursement, but are to be temporarily stored at the Property, shall be made to the extent the request relates to such stored materials so long as the request is accompanied by (i) proof that such stored materials are included within the coverages of insurance policies carried by Borrower or proof of other insurance which has been approved by Lender, (ii) evidence reasonably satisfactory to Lender that the ownership of such materials is invested in Borrower free of any liens and claims of third parties, (iii) evidence reasonably satisfactory to Lender that such materials are protected against theft or damage, and (iv) evidence reasonably satisfactory to Lender that the materials used in the construction of the Project are not commodity items but are uniquely fabricated for the

[p. 12]

construction. Lender may require a separate security agreement and Uniform Commercial Code financing statements to cover any such materials, equipment or furnishings so stored at the Property and such other information and assurances as Lender may reasonably require.

* * *

[p. 24]

8.10 Liens. If any claim of lien is recorded which affects the Property or Improvements, Borrower shall, within twenty (20) days after such recording, or within five (5) days after Lender's demand, whichever last occurs: (a) pay and discharge the same; (b) effect the release thereof by recording or delivering to Lender a surety bond in form and amount satisfactory to Lender, or (c) provide Lender with other assurance which Lender, in its sole discretion, deem to be satisfactory for the payment of such lien and for the full and continuous protection of Lender from the effect thereof.

* * *

[p. 36]

12.12 Liens. The filing of any lien against the Property or Improvements, if the claim of lien continues for twenty (20) days without discharge, satisfaction or the making of provision for payment to the satisfaction of Lender.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 91-1840 PHX CAM

RED MOUNTAIN MACHINERY COMPANY,
Plaintiff,

v.

GRACE INVESTMENT COMPANY, et al.,
Defendants.

ORDER

Having considered plaintiff's motion to remand, the Court concludes as follows:

Procedural Background

On October 22, 1991, Red Mountain filed this action in Yavapai County Superior Court seeking foreclosure of the leasehold interest in the real property leased by Grace from the Tribe. The defendants subsequently removed the action to this court. Defendants filed a motion for judgment on the pleadings arguing that the Arizona lien law is preempted by the pervasive Federal statutory and regulatory control of leases involving Indian land. The Court converted the motion to a motion for summary judgment and found that the Arizona lien law is preempted by federal laws. The Ninth Circuit has reversed stating that there is no preemption in this case. *Red Mountain Mach C. v. Grace Inv. Co.*, Slip Op. at 7877 (9th Cir. 1994). Thus, the only remaining claim seeks lease foreclosure under Arizona law and there is no federal question jurisdiction.

Plaintiff has filed a motion to remand arguing that, in light of the Ninth Circuit ruling regarding preemption, this court lacks subject matter jurisdiction.

Discussion

Relevant to this motion, 28 U.S.C.A. § 1447(c) provides:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . .

28 U.S.C.A. § 1447(c)(1994). Because the Ninth Circuit has determined that there is no federal preemption of the Arizona lien law in this case, there is no federal question subject matter jurisdiction. In addition, it is clear that there is no diversity of citizenship. Therefore, there is no federal subject matter jurisdiction in this case. As the claim was removed only on the basis that federal Indian law preempted the state law, the Ninth Circuit's ruling makes it clear that this court lacks federal question subject matter jurisdiction or even supplemental jurisdiction over the state law claim in this action.

IT IS THEREFORE ORDERED THAT plaintiff's motion to remand [9/28/94] is granted. The Clerk of Court shall remand this action to state court.

DATED this 21 day of October, 1994.

/s/
C.A. Muecke
U.S. District Judge